

Mulungu (Migration) [2020] AATA 1815 (12 March 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Francisca Mulungu

CASE NUMBER: 1804860

HOME AFFAIRS REFERENCE(S): BCC2016/2066873

MEMBER: Roger Maguire

DATE: 12 March 2020

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations;
- cl.820.221(1) of Schedule 2 to the Regulations.

• Statement made on 12 March 2020 at 11:48am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – parties validly married – Marriage Certificate provided – sponsor passed away – the applicant was the sole beneficiary of the sponsor’s will – genuine and continuing relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), r 1.15, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 15 June 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because there was not sufficient evidence to satisfy the delegate that the applicant was the spouse of the sponsor, as defined under section 5F and 5CB of the Act.
4. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The issue in the present case is whether the applicant is the spouse of the sponsor, as defined under section 5F of the Act.
6. SPOUSE/DE FACTO (cl.820.211(2)(a), (cl.820.221)

Whether the parties are in a spouse or de facto relationship

7. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who was an Australian citizen, and who passed away on 6 December 2018.
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

9. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.

10. There has never been an issue as to whether the sponsor was an Australian citizen for the purposes of subclause 820.211(2)(a), and the Tribunal finds that he was so.
11. The Tribunal has before it, Queensland Marriage Certificate Registration Number 2015/21794, naming the applicant as bride, and the sponsor as groom, and showing that they were married at the Courthouse, Bundaberg on 16 November 2015.
12. In reliance on this evidence, the Tribunal finds that the applicant and the sponsor were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a) of the Act.

Are the other requirements for a spouse relationship met?

13. The Tribunal has given consideration to each matter in r.1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under r.1.15A(2).

14. 1.15A(3)(a)

- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.

15. When the applicant initially met the sponsor, she was on a Visitor Visa, and had no right to work. The sponsor was on a Disability Pension which was their main source of income during the first year of their relationship. The sponsor customarily withdrew his full pension from his bank account once it was credited, as he preferred paying cash. Following their marriage on 16 November 2015, the sponsor informed Centrelink of this occurrence, and his pension was decreased. Following the lodgement of the present visa application, the applicant had work rights and commenced casual work at a local farm on 12 October 2016, earning a gross sum of \$24,863 in that financial year. The applicant adopted the sponsor's practice of withdrawing and passing funds to the sponsor for payment of household expenses. Following the decision under review, on 13 February 2018, a joint account was opened but was not used owing to the sponsor's deteriorating health. Nevertheless, the Tribunal is satisfied that once the applicant had the financial capacity to contribute to household expenses, she did so, by pooling her financial resources with the sponsor's to meet daily household expenses. There is no evidence in relation to legal obligations owed by one to the other.
16. There was no joint ownership of property. The sponsor owned his property at the time of the commencement of the relationship, and transferring it into joint names was probably not justified in view of the attendant expense, and their respective financial circumstances.
17. The applicant was the sole executor and beneficiary of the sponsor's will. In addition, the tax invoice for the sponsor's funeral was issued to the applicant, and paid by her. The Tribunal gives weight to these matters.
18. The Tribunal finds the financial aspects of the relationship to be consistent with a spousal relationship between the applicant and the sponsor.

19. 1.15A(3)(b)

- Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.

20. The applicant and sponsor commenced living together at a property owned by the sponsor on 16 September 2015, the 40th anniversary of Papua New Guinea's independence, and continued to do so until the time of the sponsor's death on 6 October 2018.
21. Evidence from Annette Samuel is to the effect that the applicant gradually taught the sponsor how to properly maintain a household, and that over a period of time the house became clean and tidy, whereas it had previously been rarely cleaned and required maintenance. The applicant did most of the cleaning and cooking, and the sponsor was responsible for household bills and budget. The sponsor also taught the applicant about Australian systems such as banking, Centrelink, and work related processes. Periodically money was sent to the applicant's adult son in Papua New Guinea. The sponsor suffered a progressive illness, and was in receipt of regular medical treatment and medication. Over time, his condition worsened, and he passed away on 6 October 2018, and the causes of death were listed as (a) Decompensated liver disease (b) Alcoholic liver disease. The Tribunal accepts that throughout the relationship, the sponsor's health was failing, and that the applicant provided much needed support to him, and was with him at the time of his passing.
22. The Tribunal finds the nature of the household to be consistent with a spousal relationship between the applicant and the sponsor.
23. **1.15A(3)(c)**
- Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
24. The Tribunal has had regard to the social aspects of the relationship and has taken into account the statutory declarations letters, photographs and other material lodged on behalf of the applicant.
25. Statutory declarations by Annette Samuel, and Linah Mountford support the genuineness of the relationship, as does the letter from Dr Harding-Smith, who was the sponsor's treating general practitioner, who strongly supported this application, and the Tribunal accepts this evidence.
26. The Tribunal accepts that the applicant and sponsor did hold themselves out socially as a married couple, and that opportunities to socialise together were limited by the applicant's state of health.
27. The Tribunal gives particular weight to the will of the sponsor, which described the applicant as his "wife", and to the fact that the applicant was the sole beneficiary of the sponsor's will. These were clear representations by the sponsor to the world at large, that he saw his relationship with the applicant as genuine, and enduring for the remainder of his life, which he knew at that time that he made it, was limited.
28. The Tribunal also gives weight to the Funeral service leaflet prepared (no doubt at the direction of the applicant) for the sponsor's funeral. A photograph of the sponsor appears together with a photograph of the applicant and sponsor together. Beneath this photograph. There appears the following:

29. *Thank you*

30. *Francisca conveys her deep appreciation of the honour paid to Ian's memory through your prayers, kindness expressions of sympathy and especially by your supportive presence today.*

31. The Tribunal has seen photographs of the applicant with the sponsor's body in the funeral casket, as well as photographs of mourners at the funeral. The Tribunal has also seen a photograph of the applicant receiving the sponsor's ashes at Bundaberg Crematorium. The Tribunal gives weight to this evidence.

32. The Tribunal finds the social aspect of the relationship to be consistent with a spousal relationship between the applicant and the sponsor.

33. **1.15A(3)(d)**

34. Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

35. The sponsor provided a hand written letter in which he expressed his love and commitment for the applicant in words. The Tribunal gives weight to this evidence. The Tribunal considers that the applicant has reciprocated this expression through her conduct, particularly over the period when the sponsor's health was failing.

36. The totality of the evidence in this application satisfies the Tribunal that although the applicant and the sponsor only knew each other for a little over three years, and were married less than three years, they shared a mutual commitment to each other to the exclusion of all others, and drew great companionship and emotional support from each other until death parted them.

37. The Tribunal finds that the nature of the applicant's and the sponsor's commitment to each other to be consistent with a spousal relationship between them.

38. Considering all of the above, the Tribunal is satisfied that at the time of application, the applicant met the requirements of subclause 820.211(2)(a)(i).

39. **Criteria at the time of decision**

40. The evidence discussed above satisfies the Tribunal for the purposes of subclause 820.221(a) that the applicant would continue to meet the requirements of subclause 820.211(2) at the time of this decision except that the sponsoring partner has died.

41. The evidence also satisfies the Tribunal for the purposes of subclause 820.221(b) that the applicant would have continued to be the spouse of the sponsor at the time of this decision if the sponsor had not died.

42. The Tribunal accepts the submissions lodged on behalf of the applicant, and the evidence of Linah Mountford that the applicant has cultural and social ties in Australia through her involvement with the OI Meri Wantok Bundaberg Inc, The Tribunal also accepts the evidence of Rev. Wayne I George Lead Pastor of St John's Lutheran Church of George Street Bundaberg and finds that the applicant has developed social ties through the church community. The Tribunal therefore finds that the applicant has at the time of this decision developed close cultural and personal ties in Australia for the purposes of subclause 820.221(c).

43. The Tribunal therefore finds that the applicant meets the requirements of subclause 820.221(2), and therefore meets the requirements of subclause 820.221(1)(b).
44. On the basis of the foregoing evidence, the Tribunal finds that at the time of application, and at the time of this decision:
- a. For the purposes of s. 5F(2)(a) of the Act, the applicant and sponsor were in a married relationship, and were married to each other in a marriage that is valid for the purposes of the Act; and
 - b. For the purposes of s. 5F(2)(b) of the Act the applicant and sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
 - c. For the purposes of s. 5F(2)(c) of the Act the relationship between the applicant and sponsor is genuine and continuing; and
 - d. For the purposes of s. 5F(2)(d) of the Act the applicant and sponsor had lived together continuously since 16 September 2015, and would continue to do so, had it not been for the sponsor's death.
45. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
46. The Tribunal therefore finds that the applicant is the spouse of the sponsor as defined under section 5F of the Act.
47. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

48. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2) of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations.

Roger Maguire
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).